# BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the amended complaint dated January 16, 1992, by Martin Entrop alleging discrimination in employment on the basis of handicap by Imperial Oil Limited.

B E T W E E N :

**Martin Entrop**

Complainant

- and -

**Imperial Oil Limited**

Respondent

## INTERIM DECISION

Adjudicator : Constance Backhouse

Date : June 23, 1995

Board File No: 93-0042

Decision No : 95-030-I

Board of Inquiry (*Human Rights Code*)
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IN THE MATTER OF a Board of Inquiry

appointed pursuant to s.38(l) of the

*Human Rights Code*, R.S.O. 1990, c.H.19

BETWEEN

MARTIN ENTROP

Complainant

- and -

IMPERIAL OIL LIMITED

Respondent

Date of Complaint: January 16, 1992

Date of Decision: June 23, 1995

Board of Inquiry: Professor Constance Backhouse

Counsel for the Commission - Marvin Huberman
Roger Townshend
Mark Hart
Vandana Taxali (Student-at-Law)

Counsel for the Complainant - Jeffrey M. Andrew
Elizabeth Nurse

Counsel for the Respondent - Colin Campbell Q.C.
Monique Smith

INTERIM DECISION #6: Conclusion of Phase One of the Inquiry

THE FACTS

This complaint involves a claim registered on 16 January 1992 by Martin Entrop that his right to equal treatment with respect to employment has been infringed because of his "handicap and perceived handicap", contrary to section 4(1), and 8 of The Human Rights Code, 1981, S.O. 1981, c.53 as amended.

Martin Entrop, the complainant, is employed as a senior operator on the control board in Complex A at the Sarnia Refinery of Imperial Oil Limited (the respondent), where he has worked for eighteen years. The Sarnia Refinery processes crude oil into gasoline products, diesel fuel, butane, propane, and different kinds of petroleum products. The employees at the Sarnia Refinery are not unionized, but elect representatives (one of whom is currently Martin Entrop) to serve on a Joint Industrial Council to negotiate working conditions and wages with management.

On 1 January 1992, Imperial Oil Limited implemented a new "Alcohol and Drug Policy," which applies to all employees. Certain provisions single out employees who work in jobs designated by the Company as "safety-sensitive," defined as positions which:

> (a) have a key and direct role in an operation where impaired performance could result in a catastrophic incident, affecting the health or safety of employees, sales associates, contractors, customers, the public or the environment; and

b) have no direct or very limited supervision available to provide frequent operational checks.

Approximately 9% of the jobs at Imperial Oil fall under this "safety-sensitive" designation.

It is uncontested that the high temperatures and pressures associated with refining large quantities of volatile and highly flammable crude oil present an obvious element of risk generally. Malfunctions in operations can result in serious personal injury, property loss and environmental damage. The senior operator position held by Mr. Entrop is designated as "safety-sensitive," in that his job entails responsibility for the control panels which monitor oil valves, pumps, temperatures, pressures, flows, blending of oil products, tank levels, and the removal of toxic by-products. Various safeguards are in place to reduce the risk of any mishap, including an instrumentation system with a complete set of alarms, safety releases on pressure vessels, high level shut offs, shut downs and alarms, regular workplace inspections, and loss control practices of investigating all untoward incidents. However, Mr. Entrop conceded in his testimony that on-the-job errors from someone in his position "could have catastrophic results." The Commission did not contest the designation of this position as "safety-sensitive."

The Policy stipulates that employees in "safety-sensitive" positions are required to disclose to management if they have experienced a problem with alcohol or drug abuse, presently or in the past. Clause H(3) of the Policy provides:

(a) Employees who have or have had a substance abuse

> problem will not be permitted to work in safety-sensitive positions. [...] Incumbents in, or candidates for, safety-sensitive positions are required to notify management if they have or have had a substance abuse problem as defined in the policy supplements. A thorough assessment will be made of all those who self-declare or are otherwise suspected of having a current or past substance abuse problem. Where a problem is confirmed, the employee will not be permitted to enter or remain in a safety-sensitive position.
>
> (b) Every reasonable effort will be made to offer an alternative position at a comparable level if the employee is qualified for an available position. Otherwise the individual will be offered a lower-level position and the company will at least maintain the employee's original rate until such a position is available, for a period of up to five years.

Mr. Entrop testified that he had had a past problem with alcohol abuse, which he first recognized in early 1984. A prolonged drinking episode on the night of 4 February 1984 resulted in property damage to his home, a physical altercation with his wife, and a subsequent arrest by the police. The next morning, after he was released from jail, Mr. Entrop testified that he experienced a religious reawakening which caused him to decide to come to grips with his alcoholism and change his life. From that morning on, he testified that he has not touched alcohol. This evidence of complete abstinence is undisputed by the Company.

Mr. Entrop received aid in his efforts to terminate his alcohol abuse problem from a number of sources. He testified that the influence of his wife, his family and his church had been central. He testified that he had sought assistance from his supervisor at Imperial Oil, who referred him to one of the

Company's physicians. The company physician referred Mr. Entrop to Lakeshore Health Clinic in Sarnia, where he attended an alcohol cessation program on an outpatient basis for four weeks full-time, and three additional months on a part-time basis. Mr. Entrop advised that he participated in Alcoholics Anonymous meetings on an almost daily basis for four or five years thereafter. At the time that the Policy was implemented at Imperial Oil, Mr. Entrop had not touched alcohol for more than seven and a half years.

Guidelines issued under the Policy define "substance abuse problem" as follows:

> For the purposes of the Policy, an employee has or has had a substance abuse problem if he or she meets one or more of the following criteria:
>
> (a) Episodic Abuse
>
> Has continued to use alcohol or drugs despite knowledge of recurring disturbances in health, work or social functioning.
>
> Disturbances include but are not limited to:
>
> (i) Policy violations or administrative actions in the course of employment that are related to alcohol or drug abuse;
> (ii) convictions for alcohol or drug-related offences under the Criminal Code or provincial statutes; or
> (iii) alcohol or drug use in situations where it is physically hazardous, e.g. driving while impaired.
>
> (b) Dependence
>
> Has developed a physical and/or psychological dependence characterized by:
>
> (i) progressive loss of control despite

either a desire to reduce intake or knowledge of recurring disturbances in health, work or social functioning; or

(ii) a pattern of tolerance and withdrawal.*

*Tolerance means that increased amounts of a substance are needed to produce the same effect, or there is markedly diminished effect with regular use of the same amount. Withdrawal means the development, within several hours of stopping or reducing substance intake, of physical symptoms related to the change in intake.

(c) Treatment

Has participated in a structured program of counselling, therapy or other treatment for alcohol or drug abuse (episodic or dependence);

It does not matter whether the treatment program is full-time, part-time or periodic; institutional (e.g. hospital detoxification), out-patient or self-help (e.g. Alcoholics Anonymous, Narcotics Anonymous); or whether it is accessed via referral from the company or the employee or family members directly. However, this does not include initial consultations with the EAP [Employee Assistance Program], health professionals or treatment agencies for purposes of assessment.

Mr. Entrop realized that given the definition of "substance abuse problem" as defined in the Policy, he would fall within the Policy guidelines, and be required to self-disclose his past history. The Policy provides in Clause E that for any violation of the Policy, "appropriate disciplinary action will be taken, up to and including termination of employment." Guidelines later issued spell this out specifically:

> An employee who is currently working in or is in the future transferred into a safety-sensitive position is required to advise his/her supervisor if he/she has or has had a substance abuse problem, including whether he/she participates in or has participated in a rehabilitation program for an alcohol or drug-related problem.
>
> Individuals in safety-sensitive positions who fail to inform supervisors of a substance abuse problem are subject to discipline up to and including termination if the company later learns of such a problem.

Material in a question-and-answer format distributed by Imperial Oil at the time of the announcement of the Policy further stipulated that for employees in safety-sensitive positions, failure to disclose would result in termination of employment.

Mr. Entrop learned about the provisions of the Policy several months in advance of its implementation, at sessions designed to inform the employees of its import. He described himself as in a great state of confusion. He stated: "I felt like I was going to lose my job, almost, and I didn't know what I did wrong." Although he was ambivalent about making the disclosure, he did so several weeks prior to the date on which the Policy came into effect. Imperial Oil requested that Mr. Entrop put his disclosure in writing, and that he provide confirmation of his treatment at the Lakeshore facility, both of which he did.

After making the written disclosure on 22 October 1991, Mr. Entrop was immediately removed from his safety-sensitive position and temporarily reassigned to a different, "less desirable" position as an outside operator at Complex A, at no loss in pay. Shortly thereafter, Mr. Entrop was advised that he would be

retrained as a technician for the Scott Road plant, with his wages frozen for five years until the pay rate for technicians caught up to his current rate of pay. This was formally confirmed on 20 December 1991. Mr. Entrop testified that this whole process of reassignment left him in a state of shock. According to undisputed evidence attested to during the hearing, the management of Imperial Oil had not observed any performance problems with Mr. Entrop related to substance abuse for at least seven years. "I was being punished for quitting drinking eight years ago," he explained. He agonized over whether he had made the right decision to disclose in the first place, given that his drinking problem was currently non-existent. After the demotion, he worried that he might lose his job entirely. "Here I'd worked through the ranks for fifteen years...to become an operator," he testified, "which was always the thing you work to. I was over a bunch of these...guys as an operator and the next thing one day...I'm all of a sudden back on an even level with them for not doing anything wrong."

Circumstances intervened, however, to prevent Mr. Entrop's permanent relocation to the Scott Road plant. First, Mr. Entrop took his scheduled holidays. Then he was pulled off regular work assignments for several months while involved in extensive labour relations negotiations required for the Joint Industrial Council. During this period, rumours were afoot that Imperial Oil intended to revise the Policy to include provision for reinstatement. Due to the vigorous representations made by the company's Director of

Occupational Health and lobbying from many other employees, the original Policy was revised in February 1992 to include the possibility of reinstatement. The Revised Policy provides in Clause H(3)(a) as follows:

> A thorough assessment will be made of all those who self-declare or are otherwise suspected of having a current or past substance abuse problem. Where a current or past problem is confirmed, the employee will not be permitted to enter or remain in a safety-sensitive position until he or she has successfully completed a reinstatement/entry review process to the satisfaction of Imperial....

Clause H(3)(c) describes this process:

> (c) An employee with a past substance abuse problem who wishes to enter or return to a safety-sensitive position must initiate and successfully complete a rigorous reinstatement/entry review process. Eligibility for reinstatement/entry is at the sole discretion of a corporate review panel. The onus is on the employee to apply. At a minimum, the employee must meet the following conditions:
>
> > (i) successful completion of a company-approved rehabilitation program, including primary treatment and an individually-tailored, mandatory aftercare program for a minimum of two years, followed by sustained abstinence from alcohol or drugs for a further five years;
> >
> > (ii) comprehensive clinical assessment;
> >
> > (iii) favourable prognosis from the Occupational Health Division;
> >
> > (iv) agreement to specified written post-reinstatement/entry controls;
> >
> > (v) supervisor/management endorsement;
> >
> > (vi) favourable personal records check, e.g., driving record, professional licences.

Mr. Entrop made formal application for reinstatement on 18 March 1992, to which he attached a series of letters from a

supervisor, friends and acquaintances, all testifying to his sobriety. He completed a detailed medical screening conducted by Imperial Oil physicians, a psychological assessment from two of Imperial Oil's Employee Assistance Program Counsellors, and an Occupational Health endorsement. At the request of the respondent, Mr. Entrop attended Parkside Lutheran Hospital in Park Ridge, Illinois, where he underwent an extensive medical and psychological assessment. These assessments involved detailed examinations, which canvassed such issues as Mr. Entrop's childhood upbringing, addiction history, marital and family history, religious history, use of tobacco, demeanour, emotional affectations, parental skills, exercise regime, intelligence levels, stress levels, sleep patterns, levels of self-esteem, current lifestyle, grooming and coping skills. In total, Mr. Entrop allowed himself to be subjected to six separate medical evaluations during this process. This resulted in a diagnosis of "alcohol dependence in remission" and "no psychological or psychiatric reasons that would prevent the patient from resuming his full duties at this time." Dr. Jonas Kalnas, a physician with Imperial Oil's Occupational Health Division, specified that "there is nothing in [Mr. Entrop's] medical record since 1984 to suggest that he has had any problems with alcohol or drugs during the past eight years." Barry Robinson, Site Operations Manager at the Sarnia Refinery, concluded that "Sarnia Refinery management has no knowledge of any drug or alcohol abuses in the past seven years. [...] For the past seven years there have been

no documented or observed performance concerns that could in any way be associated with substance abuse." The company's Director of Occupational Health, Dr. Arnold Katz, advised Imperial Oil's management that "no further treatment or ongoing counselling is indicated."

On 15 May 1992, Imperial Oil notified Mr. Entrop that he would be reinstated to his former position as senior operator if he would agree to sign an undertaking regarding post-reinstatement controls. The undertaking provided as follows:

**UNDERTAKING REGARDING POST REINSTATEMENT CONTROLS**

In consideration of my being reinstated to a safety-sensitive position with Imperial as Senior Operator - Sarnia Refinery, I agree to the following:

1. I shall undergo unannounced alcohol testing, at a frequency of at least twice per quarter. I acknowledge that this testing is in addition to any testing that I may be required to undergo as an employee in a safety-sensitive position in accordance with the Alcohol and Drug Policy.

2. I shall continue to abstain from alcohol.

3. I shall immediately report to my supervisor any alcohol or drug related charges.

4. I shall report to the Occupational Health Division any changes in my circumstances that may significantly increase the risk of relapse.

5. I shall immediately report any alcohol relapse to my supervisor.

6. I shall undergo an annual mandatory medical examination, including medical screening for alcohol and drug abuse, to be conducted by Imperial's Occupational Health Division.

7. I shall meet on a quarterly basis with my supervisor to review my performance and my compliance with this undertaking.

8. I understand that my reinstatement is conditional upon maintaining satisfactory job performance and my compliance with the above conditions. I further understand that non-compliance with any of the above conditions may result in discipline, up to and including termination, or permanent reassignment from my safety-sensitive position as determined appropriate by management.

9. I understand that a senior management review panel of Imperial, constituted in accordance with the Alcohol and Drug Policy, shall review the above conditions on a yearly basis.

10. In addition to the terms and conditions of this undertaking, I shall comply with and am subject to Imperial's Alcohol and Drug Policy.

11. As reinstatement was approved for the position of senior operator - Sarnia Refinery, approval by the Reinstatement Review Panel will be required if the employee applies for a different type of safety-sensitive position.

Mr. Entrop testified that he felt some reluctance to sign this statement, because he was being singled out and treated differently from other employees. "The bottom line was I didn't drink," he explained. "I know there's people, there's managers, there's everybody else that drinks. They go out partying once in awhile. They could have, at any time, maybe come into work impaired. I didn't drink. There was no chance for me to ever come into work with alcohol on my breath and that's what bothered [me], but yet I was the one they were picking on and I'm the one that they were going to watch closely, but yet I could see other people around, they drank as much, if not more than what I drank back in '84...." Nevertheless, in order to obtain reinstatement to his former position, Mr. Entrop signed the undertaking on 26 May 1992.

Mr. Entrop has continued to comply with the undertaking, and was subjected to various random breathalyser tests. The Policy requires that all employees holding "safety-sensitive" or "specified employee positions" are required to undergo random, mandatory testing for drugs and alcohol. Mr. Entrop is required to submit to these tests due to his "safety-sensitive" designation. Over and above the random tests he completes in keeping with the Policy generally, he has also completed the additional unannounced alcohol tests specified in his "undertaking." Under the terms of the Policy, the tests are administered by a "collection agent" (a trained nurse or technician) after the employee signs an "Acknowledgement and Consent form" consenting to the test, authorizing the release of its results to management, and acknowledging awareness of the implications of a positive test result. (Refusal to consent to testing results in disciplinary action for all employees, up to an including termination.) The test involves the use of a breathalyser instrument, which measures and digitally displays the individual's blood alcohol concentration and provides two printouts of the result. Where the reading indicates a blood alcohol concentration of .04% or higher, the collection agent is required to administer a second test immediately in the presence of another Imperial Oil representative. If the second test confirms the earlier reading, the alcohol test result is deemed positive. At that point the collection agent is directed to contact the "medical review officer," defined under the Policy as

"an independent physician with expertise in the field of substance abuse." The medical review officer (MRO) is directed to speak with the employee concerned, to:

> (i) obtain the donor's relevant medical history and other relevant biomedical information;
>
> (ii) interpret and evaluate the Positive Alcohol Test Result, together with all relevant information, in accordance accepted MRO procedures; and
>
> (iii) immediately provide the Collector with an interim determination of either positive or negative with respect to the Positive Alcohol Test Result.

All tests administered to Mr. Entrop, including the random urinalysis tests also administered for drugs, have been returned negative for the presence of any alcohol or drugs. In view of his continued sobriety and the consistent pattern of negative test results, on 23 January 1995, Imperial Oil reviewed the original conditions in Mr. Entrop's undertaking. In early March, 1995, revisions were made to the undertaking to delete the requirement for additional unannounced alcohol tests of a frequency of at least twice per quarter. Yearly medical examinations were also dropped. Quarterly meetings to review Mr. Entrop's job performance were eliminated, and the stipulation that his reinstatement was conditional upon "maintaining satisfactory job performance" was also deleted. The undertaking continues to stipulate that Mr. Entrop will abstain from alcohol, immediately report to his supervisor any alcohol or drug related charges, report to the Occupational Health Division any changes in his circumstances that may significantly increase the risk of relapse, immediately report any alcohol relapse to his

supervisor, and continue to comply with the Alcohol and Drug Policy. Mr. Entrop continues to remain subject to the random alcohol tests administered to all employees under the Policy, and to the bi-annual medical examinations required of all employees as well.

LEGAL ISSUES

A. The Definition of Handicap

Discrimination on the basis of "handicap" is prohibited under the Human Rights Code, R.S.O. 1990, c. H.19, as amended, s.5(1):

> Every person has the right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap.

Section 10(1) defines "because of handicap" to mean:

> for the reason that the person has or has had, or is believed to have or have had,
>
> a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
>
> b) a condition of mental retardation or impairment,

c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

d) a mental disorder, or

e) an injury or disability for which benefits were claimed or received under the Worker's Compensation Act;

(emphasis added.)

Nothing in this section specifically includes "alcoholism" or "dependence on alcohol" within the definition of "handicap," and this appears to be the first case within this jurisdiction to consider whether alcoholism, alcohol dependency, and alcoholism in remission constitutes a "handicap." The Commission called Dr. Harold Kalant, a Professor Emeritus in Pharmacology from the University of Toronto, and Director Emeritus of the Biobehavioral Research, Addiction Research Foundation, as its expert on this issue. Dr. Kalant is widely recognized as a leading international expert in the field of drug and alcohol dependence.

Dr. Kalant testified that there is no universal agreement as to the definition of "alcoholism." One definition articulated by Robert M. Morse M.D. and Daniel K. Flavin, M.D., "The Definition of Alcoholism" in The Journal of the American Medical Association (August, 1992), vol. 268, 1012 at p. 1013, stipulates:

> Alcoholism is a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.

Dr. Kalant chaired a committee of the Royal Society of Canada, which reviewed a number of different definitions for alcoholism. The committee concluded that there are only two essential elements common to all. First, there is regular, frequent use of a psycho-active drug in amounts large enough to reliably produce psychoactive effects (reward or reenforcement). Second, there is extreme difficulty in stopping such use, even if the user is highly motivated to stop.

Dr. Kalant gave unequivocal evidence before this board that alcoholism is an illness. Dr. Kalant defined "illness" as "a disability or a malfunction that interferes with one's normal state of well-being and effective physical, psychological, social function," and noted that on this basis, alcoholism is clearly a disease. This assessment is supported by the respondent's Director of Occupational Health, Dr. Arnold Katz, who also testified that alcohol or drug dependency is a "disease" or an "illness."

Dr. Kalant testified that researchers have identified two causes of alcoholism. Some claim that alcoholism is an illness which is primarily genetically determined, in which the offspring of biological parents who were alcoholic inherit a greatly increased predisposition to become alcoholic. Others contend it is an acquired disorder of behavior, secondary to a range of personal, familial and societal influences encouraging excessive use. The overall view now, according to Dr. Kalant, is that both explanations are valid. Social factors play a very important

role, but within a given society, some individuals, by virtue of genetic predisposition, are more likely to succumb to these influences. Dr. Kalant estimated that in North America, the incidence of alcoholism ranges from 5% to 10% of the adult population.

The medical evidence indicates that the effects of alcohol vary with an individual's size, sex, and amount of food in the stomach. After a single dose, the following may be observed: initial relaxation and loss of inhibitions, increased sociability, impaired coordination, slowing down of reflexes and mental processes, attitude changes, increased risk-taking and bad judgment or danger in driving a car or operating machinery, sleepiness. Long term effects harm many body organs, including the pancreas, gastro-intestinal tract, blood circulation, heart, liver, kidney and brain. Prolonged repeat usage may produce liver cirrhosis, ulcers, memory loss, impotence and increased risk of cancer.

The uncontradicted expert evidence led orally before this tribunal suggests that "alcoholism" fits without difficulty into the definition of "handicap" under the Code, as an illness or disease creating physical disability or mental impairment, and interfering with physical, psychological and social functioning. The use of alcohol constitutes a "handicap" where an individual has reached a stage of addiction or dependency.

Although I believe this is sufficient to dispose of the issue that alcoholism (or more accurately in this case,

alcoholism in remission) meets the statutory definition of handicap, counsel for the respondent made one additional argument. He argued that a "handicap" should not include "what may be regarded as temporary conditions over which an individual may be said to have control." In support of his position, respondent's counsel cited Ouimette v. Lily Cups Ltd. (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.) and Ontario (Human Rights Commission) v. Vogue Shoes (1991), 14 C.H.R.R. D/425 (Ont. Bd. Inq.), which appear to represent something of a departure from the traditional statutory interpretation of the concept of "handicap."

In Ouimette, an Ontario board ruled that influenza causing a "few days illness" did not constitute a "handicap," noting that the definition of physical disability required "substantial ongoing limits on one's activities" or "an ongoing material source of impairment." The case was complicated by the fact that the complainant also suffered from an allergy, which the board apparently considered to fall within the definition of "handicap." Judith Keene has noted that "the reasons for the board's findings are obscure," [see J.R. Keene Human Rights in Ontario (Scarborough: Carswell, 1992) at 103]. In my view, the decision in Ouimette ought to be restricted to its own peculiar facts. It ought not to be quoted out of context and regarded as authority for modifying the statutory definition of disability in other cases, such as this one. However, the decision was mentioned in Vogue Shoes, where another Ontario board concluded

that the complainant's obesity did not constitute a "handicap" under the Code. It was brought to my attention that the headnote in Vogue Shoes says that the board held that in order to constitute a "handicap" under the Code, the condition must be "ongoing." This is incorrect. The complainant's obesity was clearly ongoing in Vogue Shoes, so this observation was not part of the holding. I similarly attach no significance to the decision in a third case, Surge v. Excelsior Glass Ltd. (12 November 1993), (Ont. Bd. of Inq., unreported,) where the complainant's contraction of "Crohn's disease" was held not to constitute a "handicap." Although the board in Surge again made reference to "a temporary disability," the decision did not rest on this point. In Surge, the complaint was ultimately dismissed on the basis that the factual evidence did not establish that Crohn's disease was the cause of the chronic absenteeism that led to this employee's dismissal.

There is nothing in s.10(1) to support the requirement that the "handicap" be ongoing. In fact, I read the statute in quite the opposite way, based both upon a purposeful interpretation of the Code, and the general language of s.10(1). In my view, the above three decisions ought to be restricted to their own peculiar facts. They ought not to be regarded as authority for modifying the statutory definition of "handicap" in other cases, such as this one.

All three cases seem to rely upon Cameron v. Nel Gor (supra), in which Professor Cumming, as he then was, stated:

"Having a handicap means not being able to do one or more important things that most people can do." In my view, refining the definition of "handicap" to require proof of an "ongoing illness" is a clear and unwarranted departure from the statutory language in the Code. Neither the word "ongoing" nor the requirement for something beyond a temporary illness appear on the face of the provisions in the act. Moreover, there is nothing in the Cameron decision to suggest that the board intended to introduce a narrower definition of handicap than the words of the Code suggest. The remarks were clearly dicta. The board in Cameron was not interpreting the statutory language when it made the remark. In fact, in that case there was no difficulty whatsoever in determining that the complainant's disability met the statutory definition. The disability in Cameron consisted of the three middle fingers on the complainant's left hand being considerably shorter than those on "a normal hand." After describing this condition briefly, the board concluded summarily: "Quite clearly, Cindy Cameron has a 'handicap' within the meaning of the Code." I do not interpret Cameron as supporting the restrictive definition of disability adverted to in Ouimette or Vogue Shoes or Surge. In any event, there can be no question that the complainant's condition in the instant case is, and is perceived as, permanent, let alone "ongoing."

Both Ouimette and Vogue Shoes have also been cited as authority for the position that the disability must be beyond the

individual's control. Judith Keene (Human Rights in Ontario, supra) notes at 103 that the board in Ouimette "goes on to discuss at some length the concept of 'reckless negligence' (in the context of the complainant having taken an analgesic without satisfying herself that it did not contain aspirin, to which she was allergic) as though to support a theory that handicap cannot exist where the individual plays some part in triggering or contributing to the handicap." In Vogue Shoes the board also suggested, without actually holding, that a disability must be "effectively beyond the individual's control." The evidence in Vogue Shoes about whether obesity was beyond the individual's control was mixed. The authorities cited in Vogue Shoes in support of this possible requirement were an unreported British Columbia decision in Jefferson v. Baldwin & B.C. Ferries Service (29 September 1976; B.C. Bd. Inq.) and Morgan v. Toronto General Hospital (Ont. Bd. Inq., 1977, cited in Cameron, supra at D/2198). Jefferson is a decision rendered almost 20 years ago. Morgan is also almost 20 years old. The passage in Morgan quoted in Vogue Shoes was dicta, and it does not speak directly to the issue in Vogue Shoes nor to the issue in this case. I do not accept that any of these cases are authority for the proposition that the statutory definition ought to be modified to require that a physical disability must be "effectively beyond an individual's control." I have heard nothing in this case that would incline me to adopt such a requirement here. Regardless, on the facts here, the expert evidence indicates that one of the

hallmarks of alcoholism is the extreme difficulty that an alcoholic has in stopping his or her use of the drug.

An argument was also raised that because Mr. Entrop is an "alcoholic in remission," he ought not to be classified as an individual with a "handicap." The respondent suggested that an individual who has remained abstinent for an acceptable period following alcohol abuse should not be regarded as handicapped under the Code if the person is determined to be able to carry out his or her employment without impairment. I do not agree. The definition, "because of handicap," includes persons who "have had" a "handicap." Furthermore, the evidence in this case indicates that whatever risks of relapse Mr. Entrop might have posed in fact, the respondent based certain employment requirements and decisions upon its knowledge of Mr. Entrop's prior alcohol dependency. Respondent's counsel conceded that the Imperial Oil treated Mr. Entrop as an "alcoholic in remission" who might be at "risk of relapse," and who therefore posed "a potential risk in a safety-sensitive position." The language of the Code attempts to protect individuals who are "believed to have or have had" a handicap. Past alcoholism, however remote in time, also constitutes a "handicap" under the Code, particularly to the extent that an individual continues to be **perceived as addicted or dependent.**

B. Prima Facie Violation of s.5 and the Concept of Discrimination and Equality

Counsel for the respondent argued that Mr. Entrop had not

been discriminated against, or treated unequally, as required to prove a violation of s.5(1). The language of the Code provides that every person has the right to "equal" treatment with respect to employment without "discrimination." The Supreme Court of Canada has recognized the importance of examining distinctions in context in order to determine whether differential treatment is discriminatory. In Regina v. Turpin, [1989] 1 S.C.R. 1296, Madam Justice Bertha Wilson noted:

> Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.
> [at 1331-2.]

Respondent's counsel noted that this formulation of the meaning of equality was based upon the path-breaking Supreme Court of Canada decision in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. There was some debate between counsel as to whether the very recent decisions of Egan v. Canada [1995] S.C.J. No. 43, Miron v. Trudel [1995] S.C.J. No. 44; and Thibaudeau v. Canada (Minister of National Revenue) [1995] S.C.J. No. 42, had altered the conceptualization of equality under constitutional law. Respondent's counsel argued that despite the varying approaches taken by different groups of Supreme Court justices, a common thread running through all three of the new decisions suggests that in reviewing issues of discrimination, courts must

be looking at serious matters that impose a disadvantage or burden upon an individual. No more precise argument about the possible impact of Egan, Miron and Thibaudeau was offered.

It was Imperial Oil's position that Mr. Entrop was treated equally and without discrimination by the respondent company. The company's argument continued as follows: Mr. Entrop was treated no differently under the Policy than other employees in safety-sensitive positions. No obligations, penalties or restrictive conditions were imposed on Mr. Entrop that were not imposed on other employees. The respondent was required, based on safety considerations, to make an assessment of the risk Mr. Entrop posed in a safety-sensitive position. At the conclusion of this assessment, Mr. Entrop was reinstated into his original position. During the process, Imperial Oil claimed that Mr. Entrop had not "lost any opportunity for advancement, status or rate of pay." From the time of his reinstatement, the additional testing and reviews were not a denial of equal opportunity, but "part of an individual's comprehensive risk assessment."

Counsel for the Commission and the complainant took strong exception to this characterization of Mr. Entrop's situation. They argued that there were three distinct incidents of harmful discriminatory and unequal treatment: the forced self-disclosure of prior alcohol problems, the reassignment, and the reinstatement subject to specified undertakings and controls. Throughout this process, they argued Mr. Entrop experienced humiliation and degradation. It was the very nature of the

assessment process itself which caused job dislocation and emotional suffering. Counsel also took issue with the suggestion that Mr. Entrop had not suffered any loss of advancement, status or rate of pay. The temporary reassignment was to a "less desirable position," with wages frozen until the lower rate of the new position caught up to Mr. Entrop's current rate. Although he was reinstated to his original position before any new wage increments came through, counsel claimed Mr. Entrop lost the opportunity for several days of overtime work, resulting in foregone wages. As for advancement, counsel noted that any promotion from the control board job would have been to a safety-sensitive position, triggering the same difficulties with the Policy all over again. The evidence, they argued, indicated a clear case of unequal and discriminatory treatment, based upon the conceptualization formulated in Andrews, Turpin, Egan, Miron, and Thibaudeau.

On this issue, this board finds the arguments of the respondent's counsel less compelling than that of the Commission and the complainant. There is nothing in the constitutional jurisprudence regarding discrimination and equality which would, at the outset, disentitle Mr. Entrop from further consideration under the specific sections of the Code.

Instead, the evidence indicates, at least on a **prima facie** basis, three separate violations of s.5 of the Code: 1) the obligation to self-disclose; 2) removal from the job; 3) a reinstatement process requiring ongoing controls.

Upon implementation of the Policy, employees working as "senior operators," such as Mr. Entrop, were required to self-disclose if they had or had had a substance abuse problem. The definition of "substance abuse problem" under the Policy includes alcohol addiction or dependency, a "handicap" under the Code. Management witnesses insisted that no employee was obligated to self-disclose, and that the requirement affected only those employees who chose to work in safety-sensitive positions. While it is true that employees could choose to avoid this process by leaving the company or seeking to switch to a non-safety-sensitive position within Imperial Oil, such options are highly constrained within the current realities of the labour market. Such "choices" do not, in any event, insulate employers from the prohibitions in the Code. Requiring employees to identify and stigmatize themselves as having (or having had) a substance abuse problem amounts to direct discrimination under the Code.

As a consequence of his disclosure pursuant to the Policy, Mr. Entrop was removed from his position as senior operator in October 1991. This constitutes unequal and discriminatory treatment of Mr. Entrop based on his "perceived handicap." This action, taken on the basis of information which was obtained in breach of the Code, also constitutes direct discrimination.

Mr. Entrop was subjected to a lengthy process of assessment and certification prior to obtaining reinstatement in July 1992. He was also required, as a condition of that reinstatement, to accede to a series of conditions and undertakings not required of

employees without "handicaps" or "perceived handicaps." This too, on its face, constitutes a form of direct discrimination.

C. Respondent's Defence: Section 17

Section 17(1): Incapability

The only defence to a **prima facie** case of direct discrimination on the basis of "handicap" is found in s.17 of the Code. Imperial Oil took the position that its treatment of Mr. Entrop was justified as a "**bona fide** occupational requirement" under s. 17 of the Code. Section 17(1) reads:

> (1) A right of a person under this Act is not infringed for the reason only that the person **is incapable of performing or fulfilling the essential duties or requirements** attending the exercise of the right because of handicap.

To prove that it falls within the exception of s.17, the respondent must establish on an objective basis, by a preponderance of evidence, that the complainant's "handicap" precludes performance or fulfilment of essential duties or requirements in respect of the prospective employment: Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. Inq.); Morgoch v. Ottawa (City) (No. 2) (1989), 11 C.H.R.R. D/80 at D/90 (Ont. Bd. Inq.).

In Ontario (Human Rights Commission) v. Etobicoke (City) (1982), 132 D.L.R. (3d) 14, the Supreme Court of Canada held that to meet the test of a **bona fide** occupational requirement, the requirement:

> ...must be imposed honestly, in good faith, and in the

> sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Thus, the respondent in our case must prove "incapability" by meeting two tests: 1) a subjective standard of "good faith" honesty, and 2) an objective standard of reasonable necessity.

I. Subjective Standard of "Good Faith" Honesty

Dealing first with the subjective standard, the respondent must prove that it developed the "Alcohol and Drug Policy" in good faith, in order to prevent "handicapped" persons from undertaking duties which they were incapable of performing. The cases indicate that where there are "mixed motives" involved, all must be justifiable in "good faith." The presence of any bad faith motivation will taint the respondent's subjective position, and render it incapable of meeting its obligation on the first branch of the exemption: Cameron v. Nel Gor Castle Nursing Home at D/2191-2; Lanark, Leeds and Grenville County Roman Catholic Separate School Board v. Ontario (Human Rights Commission) (1987), 8 C.H.R.R. D/4235 at D/4238 (Ont. Div. Ct.); appeal dismissed as moot, 67 O.R. (2d) 479 (C.A.); Keene Human Rights in Ontario (supra), at 352.

Company officials testified that the new Policy was inspired in part by a renewed corporate focus on "operations integrity"

which began in the late 1980s, and in part as a response to the tragic environmental devastation caused by the Exxon Valdez oil tanker spill in Alaska. "The protection of Imperial Oil's corporate financial position" was also conceded to be "a contributing factor," as were "legal trends relating to liability for operations" and "policy trends in competitive companies and other institutions."

A great deal of evidence was led concerning the actual process by which the Policy was formulated. The employees of Imperial Oil had substantial opportunity for input. Barbara Butler, a management consultant who specializes in the development of alcohol and drug policies for the workplace, and author of Alcohol and Drugs in the Workplace (Toronto: Butterworths, 1993), facilitated three workshops for the respondent in 1989, at which groups of designated employees came together to help to design Imperial Oil's "Alcohol and Drug Policy." Extensive consultation with experts in substance dependency and treatment provided research background for the workshops. Imperial Oil attempted to assemble one of Canada's most comprehensive databases on the issue of workplace alcohol and drug abuse. The company intended its new Policy to "set a precedent as the strongest and most comprehensive substance abuse program in Canada."

The influence of the Exxon Corporation in the United States was another impetus to the policy development process, although the extent of the influence was subject to debate. Exxon

Corporation is the majority share-holder of the respondent company, and owns 70% of the shares of Imperial Oil. Evidence was led that Imperial Oil is a "stand alone" company, independent to some extent from its majority shareholder, but also sharing information, technology and personnel to some degree as well. Exxon had apparently recently revised its own alcohol and drug policy and informed Imperial Oil that it was expected to develop a policy as well. The witnesses for the respondent insisted that Imperial Oil was permitted to examine its own corporate needs and develop its own Policy as required. Management briefing notes compiled during the process did state, however, that "the alternative of the Exxon policy" was not "a threat" - it was "a reality." Documents produced by the company indicated that throughout the development of the Policy, comparisons were explicitly drawn between the models being developed by Imperial Oil employees and the policy in existence at Exxon. Imperial Oil conceded that its Policy was developed "in consultation with Exxon" and that it was "broadly consistent with [Exxon's] policy." Although early drafts of the Imperial Oil Policy differed from Exxon's, the Policy ultimately promulgated by Imperial Oil in January 1992 was substantially similar to the one adopted in 1989 by Exxon.

The Commission argued that Imperial Oil's Policy was developed in bad faith, or at least from mixed motives, some of which failed to meet the test of honest, good faith motivation. The Commission argued that the genesis of the Policy was

problematic, in that it was developed in part to satisfy Exxon and in part for financial reasons. The Commission claimed that the respondent's Policy was part of a larger "war against drugs" directed against all illicit drug use, regardless of any effect on job performance and safety.

Counsel for the respondent vigorously disputed this claim. The respondent argued that the Policy was developed and implemented in good faith as part of a comprehensive risk management system. There was uncontested evidence that the oil industry is a high risk business, and that an accident at an oil refinery could create a catastrophic incident. Imperial Oil's policy development process involved input from employees, management and medical staff, consultation with experts on alcohol addiction, and data gathered from a company-wide survey. The Policy was developed to reduce and monitor the risk of employee impairment from alcohol.

After reviewing the whole of the evidence, it is my conclusion that the respondent has proven that it met the subjective standard of "good faith" honesty in developing this Policy. The cross-border influence of Exxon and the financial component, while clearly present, represented specific factors which were weighed in the overall assessment of risk management. Imperial Oil compared its Policy to the Exxon policy during the process of policy development because, as a major oil producer, Exxon experienced risk factors similar to Imperial Oil. Searching for ways to reduce costly accidents is directly related

to the need to remain financially secure within a highly competitive industry. These are not motives which tainted the policy development process, but legitimate aspects of a good faith appraisal of measures to enhance workplace safety. Imperial Oil devoted significant time, effort and expense to create a Policy which the corporation believed would result in a substantial reduction in accidents due to impairment.

II. Objective Standard of Reasonable Necessity

The evidence is considerably less convincing on the second branch of the test. The respondent took the position that, under the second objective standard of reasonable necessity, Mr. Entrop was incapable of fulfilling the essential requirements of a safety-sensitive job. To assess this claim requires consideration of several subsidiary matters. First, there is no dispute between the parties that Mr. Entrop's job as senior operator at the Sarnia Refinery is properly designated as a "safety-sensitive position" under the Policy. Should Mr. Entrop be unable to perform his responsibilities as senior operator safely, "catastrophic" errors might result.

The next question is whether there is objective evidence to support Imperial Oil's claim that it must have the right to insist that employees performing safety-sensitive jobs remain free from impairment from alcohol. The Commission took the position that there was insufficient evidence to indicate that substance abuse presented a significant problem within the Sarnia Refinery. At the outset of the policy development process, the

respondent had little concrete information concerning the extent of substance abuse in its workforce. Glenn McGinnis, Manager of Refining Services in Imperial Oil's head office in Toronto, admitted that he knew of no serious workplace incidents in Canada in which "substance abuse was a contributing factor." He further conceded that he was not aware of "any evidence" to suggest that "any of the employees of Imperial Oil, specifically in the Sarnia Refinery, [had] a substance abuse problem." Nor was he aware of "any incident from impairment related to the [control] board job at Sarnia Refinery."

As part of the policy development process, however, Imperial Oil retained external consultants to prepare a survey to collect data on the nature and extent of the use and effects of alcohol, street drugs and medications in its workplace. The census survey was developed by Dr. Adrian Wilkinson, Director of Research at Mensana Corporation, a research consultant psychologist with expertise in addictions and substance abuse. The survey was conducted by Canadian Facts, an independent research firm, which mailed out confidential questionnaires to more than 13,000 people, representing almost the entire regular employee population of Imperial Oil. The overall response rate to the survey was 49.5%, sufficient to obtain "a valid profile of the employees of the company." The final report, "Substance Use and the Workplace; Survey of Employees," was completed in April 1991. The findings indicated that in the past 12 months, 93% of Imperial Oil employees had used alcohol, an incidence of drinking

"somewhat higher" among Imperial Oil employees than the general population of employed individuals. The company's percentage of above average drinkers (defined as 8-20 drinks a week) and heavy drinkers (21 drinks or more a week) was also somewhat higher than the general population. The incidence of street drug use, 7% in the past 12 months, was lower than that reported in other national surveys. The differences were largely accounted for by the fact that the company population is slightly older than the Canadian average and predominantly male.

All respondents were asked "Do you have, or have you ever had, a problem with alcohol or drugs?" Those who said yes were then asked "Have you dealt with or are you dealing with this problem?" Dr. Wilkinson noted that in answer to this question, seven percent reported that they currently have or previously had a problem. Although only 5% of these said they had a problem but had not or were not dealing with it, Dr. Wilkinson concluded that this 5% constituted "a significant proportion." Furthermore, Dr. Wilkinson's report noted that some of the group of employees who claimed to have dealt with past substance abuse problems "also indicated that they are continuing to use alcohol at levels that experts on substance use would consider to be clearly hazardous."

In the four weeks prior to the survey, 22% of the respondents reported using alcohol during working hours, including off-site meal breaks; the statistic was composed of a high of 46% among sales employees to lows of 7% in plant or field operations. Alcohol was the drug identified by 78% of employees

as having the greatest negative impact on the workplace, although negative effects were also reported from illicit drugs and medications.

The survey also sought opinions about the impact of alcohol and drugs on the job. Of the respondents, 0.5% reported accidents, and 1.7% "near misses" caused by their own use of a specified substance. Alcohol was the most frequently reported substance involved in both situations, with the probability of reporting being 3 to 4 times higher among the heavy drinkers than the other drinker categories. Respondents were also questioned about problems associated with substance use by members of their immediate work group. Here 3.3% of respondents attributed accidents to substance use, 7.2% attributed near misses. Other negative effects were reported by 22.5% of the respondents. Problems were reported to be disproportionately high among workers in plant/operations.

Based on the survey, Dr. Wilkinson testified that the "risk of adverse effects of substance use" derived not only from a relatively small group of heavy drinkers, but "across the spectrum of use or users." He noted that "people who are apparently below average in the population with respect to alcohol use" were "reporting negative effects of their drinking in the workplace." Based on this finding, Dr. Wilkinson advocated the importance of aiming policies "at the whole employee population."

James Levins, General Manager of Corporate Services at

Imperial Oil, testified that the findings from the survey, particularly the data concerning the number of near misses and accidents reported due to the influence of substance abuse, were cause for concern to the company. Counsel for the Commission objected that the data regarding near misses and accidents were unreliable, because a number of employees may have been reporting the same incident. They also argued that the survey was overly broad, in that it did not reflect the specific workforce at the Sarnia Refinery, nor the practices specifically of employees in "safety-sensitive" positions. While these arguments are important, they do not, in my view, detract from the overall findings of the survey. The evidence contained in this comprehensive survey suggests that Imperial Oil was objectively justified in its decision to intervene in the workplace culture to attempt to reduce alcohol abuse. Based on the survey results, this tribunal finds that there is objective evidence to support Imperial Oil's claim that it has the right to insist that employees performing safety-sensitive jobs remain free from impairment from alcohol. The board therefore holds that, under s.17(1), freedom from alcohol impairment is an essential duty or requirement of safety-sensitive jobs at Imperial Oil.

However, establishing proof of an "objective standard of reasonable necessity" becomes more tenuous when the respondent claims that due to his "past alcohol abuse problem," Mr. Entrop is incapable of meeting this requirement. An employer needs to provide substantive evidence that an employee's physical or

mental condition is having a negative impact on job performance. The evidence before this tribunal falls far short of that standard. The first difficulty arises with the definition of "substance abuse" in Imperial Oil's Policy. Dr. Kalant, the Commission's expert witness, testified that he had no problem with the inclusion of "episodic abuse" and "dependence" in the definition of alcoholism. However, he stated that the third component, under the heading labelled "treatment," ought not to be part of the definition. This was a "post-hoc recognition" that someone had been an alcoholic, he noted. Someone who had only a history of treatment, without a history of repeated relapse, ought more properly to be considered a "former alcoholic," he testified, not an "alcoholic."

In contrast, Imperial Oil claims that because of the risk associated with Mr. Entrop's past alcoholism, the company is justified in forcing him to self-disclose his earlier problem, reassigning him out of his safety-sensitive position, putting him through a complex assessment process and ultimately reinstating him only under rigorous controls. The evidence adduced at the hearing does not support the respondent's position.

Managers at Imperial Oil have known about Mr. Entrop's past alcohol problems since 1984. Yet he was permitted to continue in his job as senior operator, responsibilities which he performed without incident, from 1984 until 1991. Throughout this period, Mr. Entrop apparently fulfilled all the essential requirements of the job, including remaining free of alcohol impairment.

Imperial Oil took the position that the company was attempting to create a "change in corporate culture" with its new "Alcohol and Drug Policy." While such a goal may be desirable, it must not be accomplished at the expense of human rights violations. The respondent is required to prove, on the balance of probabilities, that the risk associated with Mr. Entrop's past alcohol problem objectively justified its differential treatment of him as an employee.

There was a great deal of expert evidence led at this inquiry regarding the risks of relapse for past alcoholics, and the risks attendant upon Mr. Entrop in particular. The witness who made the strongest case for the respondent was Dr. Arnold Katz, the Director of Occupational Health at Imperial Oil. Dr. Katz noted that it was impossible to pinpoint with any certainty the exact length of abstinence which would indicate that a person with a past problem presented the same risk as a person who had no problem. "There's not a body of literature that discusses this in any detail, or with any substance, past two years, frankly," he stated. "There isn't a specific time at which one can make a definitive statement about risk."

On balance, however, Dr. Katz's evidence was not dissimilar in significant respects from that of the Commission's expert witness, Dr. Kalant. Dr. Katz testified that the first two years of alcoholic rehabilitation represented "the greatest risk for relapse." At "about the five year mark of continued abstinence," Dr. Katz admitted, one could diagnose a "successful recovery."

Indeed, earlier drafts of the "Alcohol and Drug Policy" indicate that the company initially considered requiring retrospective self-declarations only back 5 years, and contemplated reinstatement after a minimum two-year confirmation period. Management documents prepared during the policy development process note that "virtually all who are going to relapse will do so during 2-year waiting period."

Dr. Katz also testified regarding the undertakings required of employees seeking reinstatement under the Policy: "The overview literature [suggests] that if somehow the company is involved in the rehabilitation efforts of an employee, the rates of continued sobriety are higher than where there is no involvement." Even Dr. Katz took issue with several of the undertakings required, however. In his opinion, it was not always necessary to require "frequent and unannounced testing, in addition to random testing," nor "a commitment to undergo annual medical examinations, including screening for alcohol and drug abuse, conducted by Imperial's Occupational Health Division." In Mr. Entrop's case, Dr. Katz testified that "the strength of his recovery was just so spectacular that I just didn't think we should get in the way of it." Dr. Katz also opposed a mandatory counselling program for Mr. Entrop, because it might have the potential to undermine his own belief in his successful rehabilitation.

Dr. Katz's opinion in this case ran contrary to the provisions of the Policy, which stipulates certain minimum

conditions regarding the rehabilitation of substance abusers, including mandatory aftercare. The Policy provides in Clause K "Aftercare", as follows:

1) All employees who complete primary treatment for alcohol or drug problems are strongly encouraged to participate in a structured aftercare program, in order to help them maintain recovery. With the employee's permission, the Employee Assistance Program, possibly in consultation with other occupational health professionals, will determine the appropriate aftercare arrangements on an individual basis.

2) Participation in aftercare is mandatory where an employee with a past substance abuse problem seeks to enter or qualify for reinstatement to a safety-sensitive position.

Expert witnesses called by the Commission testified that the risk posed by Mr. Entrop did not justify his treatment under the Policy. Dr. Kalant stated that rates of success in the treatment of alcoholism vary inversely with the severity and duration of the problem. "Skid row drinkers," who have lost their jobs and families, whose only social support comes from fellow alcoholics, whose only pleasure in life is drinking, have extremely low rates of recovery. People who still have strong social links with their families and their jobs, and shorter histories of alcoholism, have much higher success rates, possibly in the range of 70% or higher under appropriate treatment programs. Mr. Entrop's strong attachment to his family, his lengthy and otherwise unblemished employment record, and his successful completion of a treatment program all placed him into a low risk category.

Dr. Kalant conceded that there is no medical agreement on "a

single, absolute cut-off point, saying beyond this there is no risk at all." However he testified that there is a relationship between the risk of relapse and the length of time the individual has maintained sobriety. He noted that in general, someone who has gone five years or more without relapse could, for all practical purposes, probably be considered cured or in indefinite remission. The main risk of relapse occurs during the first year, when there is a greater than 50% risk of relapse. By the time sobriety has been maintained for five years or longer, the risk diminishes to a few percent. Dr. Kalant cautioned that one could never say that there is no risk, but the longer the period of sobriety, the higher the probability that there would be no relapse. At the time that the Policy was implemented at Imperial Oil, Mr. Entrop had not touched alcohol for more than seven and a half years.

Dr. Kalant reviewed the assessment completed upon Mr. Entrop by Parkside Lutheran Hospital, and concurred in the diagnosis "alcohol dependence in remission." Questioned about whether an individual in Mr. Entrop's position, who had maintained sobriety for seven and a half years, would require further treatment, Dr. Kalant replied in the negative. Dr. Kalant emphasized that relapse was what necessitated treatment, not a risk of relapse. Given Mr. Entrop's history, there was "very little risk" of relapse. "You treat problems that exist," stated Dr. Kalant. "If he had gone for seven years or longer without such problems, I'm not sure what there would be to treat."

Dr. Kalant testified that the general guidelines for reinstatement to safety-sensitive positions under the Policy were probably "excessive." Dr. Kalant also characterized the undertaking that Mr. Entrop was required to sign to obtain reinstatement to his position as "excessive" and "demeaning," and an example of "using a sledgehammer to kill a fly." He took particular issue with the repeated and unannounced testing for alcohol, the requirement that Mr. Entrop undergo annual medical examinations when other employees only had to undergo bi-annual examinations, and quarterly performance reviews not required of other employees. Dr. Kalant offered his opinion that it was "excessive" to require an individual such as Martin Entrop, who had demonstrated successful rehabilitation for more than seven years, to sign the wide-ranging undertakings set out by Imperial Oil.

Dr. Martin Shain, Head of the Workplace Program and Senior Scientist at the Addiction Research Foundation, Head of the Workplace Program at the Centre for Health Promotion, University of Toronto, and Assistant Professor with the Department of Behavioral Science at the University of Toronto agreed with Dr. Kalant. Dr. Shain's area of expertise is the evaluation of workplace measures designed to deal with substance abuse. Dr. Shain characterized the Imperial Oil Policy as "highly unusual," and noted that he was unaware of a similar policy throughout Ontario. He testified that he believed it was "unreasonable" to require employees to self-disclose past substance abuse problems

under threat of discipline, and more likely to re-enforce denial than to breach it. The company's requirement of seven years sustained sobriety was "overkill," according to Dr. Shain. Although Dr. Shain noted that there is "no magic number," he offered his opinion that anything more than three years is unnecessary. The agreement to undergo frequent, unannounced tests for alcohol upon reinstatement also struck Dr. Shain as going "beyond what's likely to be necessary." Dr. Shain stated that he believed the Policy would be more likely to have "a chilling effect," in that it conveys a sense of mistrustful surveillance, rather than an environment of direct employee assistance.

In summary, it is clear that no one can state with absolute certainty when a former alcoholic's risk of impairment diminishes to such an extent that the risk is the same as for other people. But the preponderance of expert evidence adduced before this tribunal indicates that for an individual in Martin Entrop's position, the risk of relapse is very low. Mr. Entrop's risk is so low, that this board has no hesitation in concluding that the respondent's decision to single him out under the Policy was objectively unjustified. It would appear that, with the passage of time, even the respondent has recognized this. As of March 1995, the most intrusive of the reinstatement controls placed upon Mr. Entrop have been discontinued.

Consequently, the respondent has failed to meet the second branch of the test under s.17(1), to prove that the differential

treatment of Mr. Entrop is objectively justified as reasonably necessary. On the balance of probabilities, based on the factual evidence adduced, this board is not satisfied that Mr. Entrop is incapable of performing the essential duties of his position. The respondent has failed to make out the requisite justification under s.17(1).

Section 17(2): Accommodation

Even if this board had ruled differently, and held that the treatment of Mr. Entrop was objectively justified under s.17(1), the respondent would still be required to meet the burden of s.17(2) of the Code, which provides:

> The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

I. Self-Declaration, Reassignment and Assessment

The respondent took the position that the self-declaration, reassignment and assessment it implemented pursuant to the Policy was an "accommodation" of Mr. Entrop under s.17(2). It argued that the Policy set in motion an essential investigative process to allow the company to determine whether Mr. Entrop was capable of fulfilling the necessary requirements of the job. The respondent claimed that without the comprehensive assessment process Mr. Entrop completed, there was no way of determining the likelihood of recidivism.

Dr. Katz, Imperial Oil's Director of Occupational Health, testified that prior to Martin Entrop's self-disclosure under the Policy, he had "no knowledge" of Mr. Entrop's history of alcoholism "other than he attended Lakeshore Health Clinic." Dr. Katz testified that the information relating to Lakeshore Health Clinic on file indicated that Mr. Entrop attended as an out-patient for four weeks at Lakeshore, but did not complete the fifth week offered. Entries on the file from both Conrad Holtz from the Lakeshore facility and Dr. Hogg, the Imperial Oil Medical Services Director in Sarnia, noted that "the prognosis, long term, is very poor for his recovery." There was no documentation in Mr. Entrop's company medical file relating to alcohol between 1984 and 1991. Consequently, the respondent claimed that it was necessary to commence a formal assessment process because Mr. Entrop had not kept the Occupational Health Department apprised of his alcohol rehabilitation. The respondent claimed that its process of assessment for Mr. Entrop was "the least intrusive, most effective means" Imperial Oil was able to identify in order to assess the level of potential risk he could pose in a safety-sensitive position.

This board has already ruled that Imperial Oil has the right to attempt to ensure that employees in safety-sensitive positions are not impaired by alcohol. Freedom from impairment by alcohol is a **bona fide** occupational requirement for such jobs. From this, it logically follows that Imperial Oil also has the right to assess the capability of its employees to remain free from

impairment by alcohol. Indeed, the respondent cited several previous human rights decisions in which an employer was held to have violated the Code because it did not conduct proper assessments of employees with disabilities: see Nowell v. Canadian National Railway Ltd. (1987), 8 C.H.R.R. D/3727 (Can. Bd. of Inq.); Wiens v. Inco Metals Co. (1988), 9 C.H.R.R. D/4795 (Ont. Bd. of Inq.) The terrain becomes more contested, however, when the method of assessment is mandatory self-disclosure and automatic reassignment out of safety-sensitive positions.

There was considerable evidence led before this board regarding alternative methods of assessment. Dr. Martin Shain testified that there were other programs which would be more effective in reducing or eliminating alcohol abuse in the workplace. According to Dr. Shain, properly trained supervisors had a "very high likelihood of being able to detect impairment" on the job. In contrast to Dr. Shain, Dr. Katz claimed that relying upon supervisors to identify impaired employees was insufficient. "I would defy a manager or a supervisor, as well trained as they may be, to pick up subtle indications of impairment, and yet there may be cognitive dysfunction at that time, in spite of the lack of gross signs on that."

In comparing the evidence of these two witnesses, I find that Dr. Shain is the more compelling. Based upon the curriculum vitae of the two, it appears that Dr. Shain's background and expertise is greater in this area than Dr. Katz's. Furthermore, although Dr. Katz struck me as an honest witness whose testimony

contained examples of laudable candour, he remains an employee of the respondent and he played a significant role in the development of the Policy under attack. Weighing the testimony of the two witnesses on the matter of supervisory assessment, I prefer Dr. Shain's. In the case of Martin Entrop, the alternate method of supervisor assessment is particularly compelling. Although the Occupational Health Department did not possess complete files on Mr. Entrop's rehabilitation process, Imperial Oil was well aware of Mr. Entrop's former alcohol dependency. Not only the Occupational Health Department but also his supervisors knew of his past problem with alcohol. Mr. Entrop's supervisors had many years to observe and scrutinize his performance on the job, and his continued freedom from impairment.

The respondent made an additional argument that relying upon supervisory assessment was increasingly difficult in the context of "downsizing." Prior to 1992, senior operators such as Mr. Entrop received significant managerial supervision in their work. As a result of substantial corporate cut-backs in 1992, the number of supervisory and waged personnel at the Sarnia Refinery was reduced by approximately 29%. Waged employees in Mr. Entrop's position were provided with greater independence, and asked to fulfil their job tasks with a minimal amount of direct managerial review. Imperial Oil argued that safety-sensitive positions were by definition unsupervised. However, Dr. Shain testified that even very limited opportunities for direct

observation of employees would be sufficient to permit a supervisor to detect the physical manifestations associated with impairment. Barrie Robinson, the Operations Manager at the Sarnia Refinery, testified that most of the "downsizing" involved employees in the operating group, not supervisors. At least one supervisory position was eliminated from Complex A in 1992, but according to Mr. Robinson, "Entrop's supervision on a shift basis was largely unchanged." The evidence indicates that since 1991, Mr. Entrop would have the following contacts on each twelve hour shift: 1) a visit from the Refinery Shift Supervisor or the Assistant Refinery Shift Supervisor, lasting from five minutes to one half hour, or visits from both; 2) a meeting of representatives from different parts of the refinery with the Refinery Shift Supervisor and the Assistant Refinery Shift Supervisor; 3) on day shifts, frequent contact with members of the leadership team; 4) when working as Inside Oil Operator, frequent contact with the Senior Coordinating Operator. Supervisory assessment, based on employee performance, remains a credible alternative method to detect impairment from alcohol.

Dr. Shain recommended that supervisory assessment be backed up by peer control programs, where fellow employees monitor their colleagues' fitness to work. The respondent attempted to counter this point by making reference to the results of the survey, in which the majority of the respondents indicated it was the supervisor's responsibility to assist an employee to get help for an alcohol problem rather than a co-worker's. Imperial Oil has

implemented various peer control programs already, but Dr. Katz testified that these were insufficiently reliable. The survey attempted to explore how effective "peer referral" was likely to be, and employees were asked about whether they perceived themselves responsible for assisting a fellow employee with a substance abuse problem. Based on their answers, Dr. Wilkinson concluded that "potential existed among the employees for the development of peer support," but that there was "need for some developmental work".

On this point, as on the earlier one, this board prefers the evidence of Dr. Shain. The survey was completed prior to the implementation of the "Alcohol and Drug Policy," well before the development of some of the excellent educational programs developed by Imperial Oil for delivery to its workforce. The evidence filed before this board indicates that peer control has delivered significant results when combined with educational programs which train workers about the hazards of impairment, the risks of "enabling" fellow workers to work impaired, and the rehabilitation mechanisms available to assist employees overcome dependencies.

Dr. Katz testified that he felt peer control would not operate adequately in an environment of "downsizing," where between forty and fifty percent of the employees were being laid off in some areas. "You cannot downsize without creating an atmosphere of concern and worry," he noted. "And I find it really difficult to say that a peer prevention in this

environment is going to take off and be successful at this time." One might just as easily predict that the atmosphere generated by "downsizing" would induce employees to turn in co-workers known be suffering from impairment. Peer control, in combination with supervisory assessment, remains a credible alternative method to detect employee impairment from alcohol.

There was also evidence adduced regarding the use of mechanical alarms and computerized performance testing devices, which would test employees' speed, dexterity and functioning prior to assuming work. Dr. Katz testified that Imperial Oil had examined the efficacy of such computer simulation systems and concluded that, at least at this time, the devices are not sufficiently sensitive to monitor worker capacity for a multitude of sophisticated jobs or to screen out all impaired employees. In this aspect, Dr. Katz's testimony was convincing, and this board finds that mechanical or computerized performance testing devices do not yet provide a credible alternative method of assessment.

Dr. Shain concluded that employers should promulgate policies based on identified needs and risks with comprehensive work rules regarding the use of alcohol. The disciplinary consequences of rule violations should be clearly spelled out. "Constructive confrontation" should be used as a form of progressive discipline, wedded at certain points to offers of help. Preventive education measures should be combined with "employee assistance programs" and health promotion programs,

developed with the full participation of management and employees. The reliability of employee assistance programs generated some controversy during the hearing. Glenn French, a private consultant who provides employee assistance programming to Imperial Oil, testified that employee assistance programs are growing and evolving rapidly within the Canadian workforce, but that there is no uniform understanding of the most effective models or features. The field is unregulated, highly competitive, and resistant to reliable methods of evaluation due to the confidentiality surrounding the treatment involved. It was Mr. French's position that employee assistance programs are insufficient, on their own, to reduce the risk of impairment on the job. Dr. Shain conceded that employee assistance programs have "rarely been evaluated in a comprehensive fashion," and "as yet have provided little evidence from controlled evaluation studies of program effectiveness in relation to alcohol consumption and alcohol-related problems specifically." However, on balance he endorsed these alternate methods of assessment in preference to mandatory self-disclosure and automatic work reassignment. After comparing the witnesses' professional credentials, hearing both witnesses, and weighing in particular the consistency or inconsistencies in their testimony, their professed levels of expertise in the field, and their demeanour, forthrightness or evasiveness on cross-examination, I have come to the conclusion that Dr. Shain's evidence is to be preferred on this point.

Barbara Butler, the management consultant retained by Imperial Oil to advise them on the development of the Policy, also testified that random testing, post-incident testing, and testing for cause were additional mechanisms to identify problem drinkers in the workplace. This latter mechanism, testing, will not be considered further during this phase of the hearing, but reserved for later analysis.

Clearly, then, the evidence indicates that there are many alternatives to mandatory self-disclosure in the effort to detect alcohol impairment on the job. This board finds that where assessment of employees' capacity to work free from alcohol impairment is indicated, methods such as supervisory monitoring of worker performance, peer-control programs, employee assistance programs and health promotion programs are all acceptable methods of risk identification.

The evidence tendered during the hearing indicates that the Addiction Research Foundation advocates the policy of utilizing the "test of least dramatic means," that "when two or more options exist that will interfere with human rights in the pursuit of some socially legitimate objective, the option chosen must be the one that least restricts the individual's right to privacy and dignity." Dr. Shain explicitly supported this approach. Where alternative measures exist, in order to meet the "accommodation" standard under s.17(2) of the Code, employers should utilize the least drastic means of assessing its workforce for alcohol impairment risks.

Mandatory self-disclosure of past alcohol dependency, no matter how long ago in the past, is an unreasonable requirement. Indeed, Dr. Martin Shain testified that mandatory self-disclosure might have a "chilling effect" upon employees, reinforcing denial among those who need to recognize their problems and seek assistance. Such concerns were also articulated by Imperial Oil in the materials it prepared during the development of its "Alcohol and Drug Policy." Automatic reassignment in the face of such disclosures also appears to be an unreasonable requirement. Indeed, such policies may make supervisory assessment and peer control programs significantly less reliable.

The respondent compared its situation to David C. Rodger v. Canadian National Railways (1985), 6 C.H.R.R. D/2899 (Cdn. Bd. Inq.), in which an employer reassigned an employee who had a seizure because of concerns that the seizure might reoccur and create a safety hazard at work. Although the board held that reassignment was not contrary to the Code, that case is clearly distinguishable from this one. In Rodger, the seizure occurred in 1979 and the reassignment occurred in 1979. In Mr. Entrop's case, the alcohol impairment ended in 1984 and the reassignment occurred in 1991. The temporal connection in the two cases is so distinct as to be incomparable. Secondly, in Rodger, both the Commission and the respondent agreed that removing the employee from his position initially was defensible. In this case, the Commission is disputing precisely that point.

II. Reinstatement Pursuant to Undertaking and Controls

The respondent took the position that the reinstatement of Mr. Entrop into his safety-sensitive position under certain controls in May 1992, constituted "accommodation" under the Code. Imperial Oil argued that Mr. Entrop remained "at some indeterminate risk with respect to remission," and that it was legitimate to require him to commit to some additional monitoring. Imperial Oil took the position that the undertaking contained "minimal controls which respect the dignity of the individual and which are the least intrusive, most effective means of monitoring an individual's potential for relapse."

The evidence does not bear this out. Mr. Entrop testified that he felt demeaned by the undertaking he was required to sign in May of 1992. Given the very low risk that Mr. Entrop presented for relapse, this board finds that the unannounced alcohol testing at least twice per quarter, the annual medical examination, and the quarterly performance reviews were intrusive, excessive and unjustified. Mr. Entrop testified that the conditions under which the testing is carried out are such that other employees know when he is being tested and sometimes make crude remarks about it, causing him to feel like a "freak." The medical examinations are not carried out by Mr. Entrop's own personal physician, but by a medical representative of Imperial Oil. The quarterly performance reviews appear to have been conducted in a manner apparently unrelated to issues surrounding Mr. Entrop's prior alcohol dependence. Furthermore, the dissension within Imperial Oil regarding the specifics of these

controls adds further credence to the argument that the stipulations in the undertaking were not completely justified. Given Mr. Entrop's demonstrated ability to maintain sobriety, the reinstatement controls were unquestionably excessive.

Dr. Kalant testified that there were "more effective ways of controlling the risk for relapse in cases where a person has demonstrated a sustained sobriety for long periods of time." Specifically, he recommended: "regular, periodic meetings with a...counsellor, preferably someone who knows the person in question and has been connected with the previous successful treatment programme or follow up, simply to review how things are going, and to recognize danger signals early, and to initiate an appropriate...psychological, social, medical response to those danger signals." This would probably be more useful, he noted, "than applying a set of rules that, by their nature, imply mistrust."

In conclusion, this board of inquiry finds that, based upon the evidence adduced, neither mandatory self-disclosure of past alcohol dependency, nor automatic reassignment, nor reinstatement pursuant to the specific controls set out in Mr. Entrop's undertaking, meet the requirements of "accommodation" under s.17(2) of the Code.

D. Remedy

The parties agreed to postpone the final argument and decision on remedies until a later stage in this hearing, since

some of the remedial orders sought by the Commission require a larger consideration of the Policy as a whole.

23 June 95
Date

Constance Backhouse, Chair
Board of Inquiry